Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20544

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In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates	)	MM Docket No. 95-92
	)	
47 C.F.R. § 73.658(a), (b), (d), (e) and (g)	)	

REPLY COMMENTS OF THE UNITED PARAMOUNT NETWORK

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REPLY COMMENTS OF UNITED PARAMOUNT NETWORK

United Paramount Network ("UPN") submits these comments in reply to the comments filed in response to the Commission's Notice of Proposed Rulemaking, FCC 95-254, MM Docket No. 95-92 (released June 15, 1995) ("NPRM") in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

The Comments filed in support of the exclusive affiliation and time-option rules (the "Rules") make abundantly clear that the Rules preserve and promote two important Commission policies -- localism and local autonomy, and competition and diversity through new broadcast network entry.

What the few proponents of these Rules appear to lose sight of is that there is a dynamic relationship between the number of new networks and the number of new broadcast stations. New station outlets will come into existence when sufficient audience-attracting programming and sufficient advertising demand come together. With new networks and their high-quality programming, one of the critical conditions for new broadcast station formation is present.

While new networks need secondary broadcast affiliates to get into the game, the presence of those new networks creates the very conditions for new broadcast stations in smaller markets that, in turn, provide the base for new primary affiliations. This positive cycle of new entry at both the network and station level reflects a healthy and growing universal, over-the-air broadcast system.

Reflecting their locally-oriented perspective, television broadcast stations of all types and kinds (affiliates and independents, VHF's and UHF's, collectively, the "Stations") support retention of these Rules,[1] even though, as NBC points out, the Rules act as a "restraint on station choice."[2] Stations thus support a "restraint" on their ability to enter into exclusive affiliation and time-option agreements. Why? Because the stations are concerned, with justification, that their ability to choose programs from new networks may be contractually limited by the established broadcast networks (Capital Cities/ABC, Inc. ("ABC"), CBS, Inc. ("CBS"), National Broadcasting Company, Inc. ("NBC"), and the Fox Broadcasting Company ("Fox"), collectively, the "Established Networks").

Stations are customers for the services offered by broadcast networks. As customers, Stations have a vital interest in seeing to it that there is robust competition and

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1. See e.g., Comments of the Network Affiliated Stations Alliance.

2. Comments of National Broadcasting Company, Inc. ("NBC Comments") at 36.

healthy diversity in the programming marketplace, and in the broadcast network marketplace in particular. That interest coincides with the public interest, and the voice of the Stations should be given great weight in this proceeding.

The incipient networks, UPN and The Warner Bros. Television Network ("WB"), also support retention of the Rules, seeing the Rules as critical to the freedom of broadcast stations to choose to affiliate with new networks.[3]

The only government agency to file comments (the United States Small Business Administration), also supports retention of the Rules,[4] as does the only public interest group to file (the Media Access Project).[5]

The only filings urging repeal of the Rules are those of three of the Established Networks.[6] Each argues that the marketplace has changed dramatically since the Rules were first adopted in the 1940's for the radio industry. Of course, no filing does, or could, take issue with that observation, although that observation in itself does not answer the question of whether current marketplace conditions provide a continuing and refreshed basis for the original rationale for the Rules.

The Established Networks also argue that the rationale of the Commission's recent repeal of several rules regulating the networks effectively dictates the outcome of this

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3. Comments of the United Paramount Network ("UPN Comments") at 21-26; Comments of the Warner Bros. Television Network ("WB Comments") at 7-8.

4. See Comments of the Chief Counsel for Advocacy of the United States Small Business Administration.

5. See Comments of Media Access Project.

6. Comments of Capital Cities/ABC, Inc. ("ABC Comments"); Comments of CBS, Inc. ("CBS Comments"); NBC Comments. Fox did not file comments in this proceeding.

rulemaking.[7] We think not. The Commission's actions in repealing the Financial Interest and Syndication Rules ("Fin/Syn"), Prime Time Access Rules ("PTAR"), and Affiliate Contract Rules were driven by a policy to promote competition: first, by strengthening the ability of networks to compete in a broader video marketplace and, second, by encouraging incipient network entry. Here, those very same policies are fostered by retaining the Rules. These Rules, as we will point out, promote incipient network entry, and they do so without weakening the Established Networks' ability to compete in the broader video marketplace.

DISCUSSION

I. The Established Networks Admit Their Incentive And Ability To Engage In Exclusive Dealing Practices

In their very candid comments, the Established Networks concede their incentive and ability to engage in exclusive dealing practices that, by any reasonable assessment, would deter the entry of incipient networks.

It is clear that the Rules prohibit "exclusive dealing," namely the practice of requiring an affiliate station to deal exclusively with one network. That is precisely what the Rules are designed to prevent. And their reason for doing so is, in large part, to assure that stations will be contractually free to carry the programs of a second network and thus provide that second network an outlet in that station's community.

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7. ABC Comments at 5-15; CBS Comments at 5-16; NBC Comments at 5-13.

A. The Established Networks Concede Their Interest in Exclusive Dealing

CBS argues that exclusive franchising arrangements such as exclusive affiliation agreements are "unexceptional;" that such practices can help "prevent" a station from using one network's programming and promotion to build an audience for the competing programs of another network.[8]

The "free rider" argument is a red herring. UPN is not looking for a free ride. We simply want to be free to negotiate with affiliates of other networks for a seat on the affiliates' bus. Secondary affiliations are no more free rides than are the clearances of syndicated programs on network-affiliated stations.[9]

The Final Report of the Network Inquiry Special Staff points out another motive for exclusive affiliation agreements -- entry-deterrence.

> "The second possibility is that the use of [exclusive dealing] provisions by existing networks is designed to inhibit the entry of new networks by 'tying up' existing broadcast outlets. That is, existing networks might be able to deny access to

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8. See CBS Comments at 29. See also, NBC Comments at 38 (inability of networks to "brand" in a competitive marketplace reduces their ability to compete with cable networks that can provide "exclusivity and differentiation"); ABC Comments at 20 ("The prohibition on exclusivity . . . precludes . . . differentiat[ion] . . . [T]he opportunity for exclusivity may encourage greater promotional spending . . . [E]fficiency would be gained were the rule eliminated by reducing the 'free rider' problem . . .").

9. CBS itself points out the "obvious and compelling" reasons why a competing network would not want to use secondary affiliations for this purpose, namely, the out-of-pattern clearances necessitated by secondary affiliations reduce the network to "the equivalent of a distributor of syndicated programming". Id. at 30-31.

> broadcast stations by additional, over-the-air, advertiser-supported networks through the use of lengthy or exclusive affiliation agreements . . ."[10]

Whatever their motives, given the passionate advocacy of the Establish Networks, there is little question that those networks would seek to engage in exclusive dealing practices were the Rules repealed.[11]

B. The Established Networks Have The Necessary Power To Engage In Exclusive Dealing Practices

The Established Networks point to the entry of alternative media and claim that network broadcasters no longer "dominate" the video marketplace.[12] Whatever the merits of that point of view, competition within the broadcasting medium itself remains a key Commission policy goal,[13] and within that marketplace the Established Networks have the ability to bargain for and obtain exclusive affiliation contracts.

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10. See Network Inquiry Special Staff, New Television Networks: Entry, Jurisdiction, Ownership and Regulation, Final Report (Oct. 1980) ("Network Inquiry Report") at 478. The Network Inquiry Report discounted the prospect of such practices because it believed it necessary that each network would have to affiliate with more than one affiliate in each of several markets in order to "tie up" enough potential affiliates to block the entry of another network. Id. at 482-83. But that analysis ignores the uneven allocation of stations among markets and thus the prospect that exclusive dealing by each network with just one affiliate in mid-to-small markets will prevent a new network from getting access to enough markets through affiliated broadcast stations to reach a sufficient percentage of U.S. television households to be viable. See UPN Comments at 12-20.

11. As discussed below, the Rules, as written, do not prevent "branding" or "product differentiation," and thus do not decrease the incentives for promotional spending or create a "free rider" problem. See infra pp. 10-11. The only remaining incentive for engaging in the exclusive dealing practices barred by the Rules would, therefore, be entry-deterrence.

12. See ABC Comments at 5-15; CBS Comments at 5-16; NBC Comments at 18-21.

13. See UPN Comments at 6-11.

As NBC notes, affiliate agreements "are worked out between the parties in a marketplace negotiation, with each party exercising its own best judgment as to what to concede in order to obtain the benefits it seeks."[14]

As the Comments from station groups and associations make clear, in that "marketplace negotiation" the Established Networks will be able to obtain contractual concessions from their affiliates, concessions that are now barred by the Rules. Certainly, not all affiliates "wanted" the extended 7 to 10 year affiliation agreement terms demanded by the Established Networks, but they agreed to those terms as part of the "marketplace negotiation" that occurred after the Fox/New World transaction. Who would doubt that in the "marketplace negotiation" that would follow a repeal of these Rules, exclusive affiliations will become the norm?

Will those terms be "imposed" unilaterally or without adequate consideration to the affiliates? The affiliates, by their comments and their opposition to repeal of the Rules demonstrate that they believe that to be the case. Indeed, what is perhaps quite surprising is that Stations want to preserve Rules that prevent them even from negotiating over these terms. As NBC points out, these Rules are "a restraint on <u>station</u> choice, not on that of a network."[15] Were it truly the case, therefore, as NBC suggests, that "it is the <u>stations</u> who hold the stronger bargaining position,"[16] one would expect that stations, particularly in smaller markets, would favor repeal of the Rules since (a) they would not agree to exclusive

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14. NBC Comments at 21. <u>See also</u> ABC Comments at 12-13; CBS Comments at 27-28.

15. NBC Comments at 36 (emphasis in original).

16. <u>Id</u>. (emphasis in original).

affiliations if they did not want to and (b) if they were willing to agree to such terms, they would be more than adequately compensated for doing so.

Affiliates unanimously and unqualifiedly oppose repeal of these Rules, providing powerful evidence that they do not want exclusive affiliation terms, but could not resist them (or be adequately compensated for them) if the Rules were repealed.

II. Exclusive Dealing Practices Would Deter New Network Entry

UPN pointed out in its comments that exclusive dealing practices by the Established Networks would deny a new network access to affiliates in a number of markets sufficient to deter its entry.

The Established Networks contest that proposition. They do so on two grounds.

First, they argue that there are a sufficient number of new broadcast outlets to support new networks. Remarkably, CBS argues, "ample opportunities exist for new networks to find outlets for their programming, as the establishment of the Fox Network, and the emergence of the United Paramount and WB Networks, clearly attest."[17] Indeed, CBS implies that a new network need no longer rely on secondary affiliations because of the proliferation of independent stations: "With the proliferation of independent stations there is little reason why any network, new or established, would opt for secondary affiliations."[18] In CBS's view, "there is little demonstrated need or demand for secondary affiliations."[19]

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17. CBS Comments at 31.

18. Id.

19. Id.

CBS is flatly wrong. In today's marketplace, there is not a sufficient number of independent stations to support a fifth, let alone sixth broadcast network.[20] New networks must rely on secondary affiliations simply to exist. There is a "need" and a "demand" for secondary affiliations. As we noted in our Comments, to be viable, UPN depends on secondary affiliations in 71 markets, representing 19% of viewers nationwide.[21] Absent the Rules and assuming exclusive affiliations, new networks could be put out of the network game.

The second argument put forward by the Established Networks why their exclusive dealing practices will not deter new network entry is the claimed ability of new networks to rely on cable carriage in markets where there may be insufficient broadcast outlets. CBS argues that "[w]here broadcast stations have been unavailable for primary affiliation, new networks can expand their coverage through cable carriage rather than by means of secondary affiliations."[22]

Let us be clear. A new network, confined in perpetuity to cable carriage for a significant portion of its distribution will fail. Cable carriage may be a mechanism to extend reach for a transition period, but, for several reasons, it is not a realistic substitute for broadcast affiliations.

Broadcast networks compete on the basis of universality. Each of the Established Networks reach virtually 100% of U.S. Television Households. On average, a

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20. See UPN Comments at 12-21.

21. Id. at 6.

22. CBS Comments at 31.

prime time television program broadcast by an Established Network achieves a 10 rating. By contrast, networks using cable systems as their local outlets can reach, on average, only about two-thirds of U.S. Television Households. The average cable network has a national rating of less than 1 point, and the highest-rated cable network achieves less than a 2 rating. As a consequence, a new broadcast network seeking to compete with the Established Networks, but forced to rely on cable system clearances, is doomed to a severe and perpetual competitive disadvantage. Each of the Established Networks are able to acquire the high-quality programming they do because they offer advertisers the potential opportunity to reach 100% of U.S. TV homes; cable systems cannot offer that opportunity.

Finally, a new broadcast network's "cable clearances" would have to rely on finding channel capacity on cable systems already filled to capacity. Given that the largest multiple system operators are vertically integrated (and, indeed, that one of those, Time Warner, is co-owned by UPN's primary new network competition), cable clearances are, as a practical matter, no more "available" in smaller markets than broadcast affiliates.

As a consequence, cable carriage is not an adequate alternative to broadcast outlets, and cable systems are an inadequate foundation on which to build a new network.

Thus, the Established Network argument that exclusive dealing practices would not hinder new network entry is a make-weight. Try as they may, try as they might, the Established Networks cannot escape the conclusion that their exclusive dealing practices would have a potentially devastating effect on new network entry.

III. "Branding" -- The Only Possibly Pro-Competitive Effect Of The Rules -- Is Not Banned By The Rules

Each of the Established Networks argues that the Rules should be repealed to permit them to "brand" their networks and thereby to achieve the pro-competitive goal of differentiated competition with branded cable networks.[23] But we submit that the Rules do not bar this practice and need not be repealed to permit it.

A. The Rules Permit "Branding"

The Rules do not prohibit the practice whereby a network and an affiliate agree that the affiliate will identify itself exclusively as that network's local outlet, so long as the network and affiliate do not agree to prevent or hinder the affiliate from taking the programs of another network.

By its terms, the Exclusive Affiliation Rule only bars arrangements concerning "programs." The text of the Rule states that:

> "No license shall be granted to a television station having any contract, arrangement or understanding, express or implied, with a network organization under which the station is presented or hindered from, or penalized for, broadcasting the programs of any other network organization."[24]

The industry appears to have read the Rule in the same fashion as we. Each of the Established Networks has either an "arrangement" or "understanding" whereby stations identify themselves exclusively with the network with which the station is affiliated. As NBC notes in its Comments, NBC promotes its stations as "NBC [channel number]" rather

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21. See ABC Comments at 20; CBS Comments at 29; NBC Comments at 37-38.

24. 47 C.F.R. 73.658(a) (emphasis added).

than by call letters.[25] NBC notes that "[o]ther networks and affiliates appear to be doing the same."[26] Thus, repeal of the Exclusive Affiliation Rule is not needed to permit "branding" and its arguably pro-competitive benefits.

B. Since the Rules Permit "Branding," WB's Complaint About UPN's Practices Is Baseless

WB states, in its Comments, that UPN is "in violation of" the Exclusive Affiliation Rule because its affiliation agreement contains a provision that requires its affiliates to "identify" themselves exclusively as part of the United Paramount Network.[27] But there is nothing in UPN's affiliation agreement, or in any other arrangements or understanding between UPN and its affiliates, that prevents or hinders its affiliates from airing the "programs" of WB or of any other network or of any other programmer.

UPN's practices in this regard are consistent with the language and purpose of the Rule and with industry practices. Indeed, since UPN itself has secondary affiliations with the affiliates of Fox and other networks who have similar understandings with their affiliates, UPN provides a "clean feed," i.e., a feed that does not contain any material (such as a "bug" or logo) identifying the programming as being associated with UPN. Provision by WB of such a "clean feed" to a station primarily affiliated with UPN, and the airing of such a "clean feed" by the UPN affiliate, would be permitted by UPN's affiliate agreement. Consequently, UPN cannot be said to be preventing or hindering a station from broadcasting

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25. NBC Comments at 38.

26. Id. at 38.

27. See WB Comments at 10, n.19.

the program of any other network organization. Thus, WB's claim that UPN is "in violation of" the exclusive affiliation rule is without foundation.

IV. The Rules Promote Competition And Diversity With No Real Loss Of Efficiency Or Other Adverse Competitive Effects

The Rules promote the prospects of new networks and thus the competition and diversity new networks foster. The Rules do so with no identifiable loss in efficiency and no other adverse effects on competition. The only positive contribution to efficiency from repeal of the Rules put forward by the Established Networks -- "branding" -- is already permitted by the existing rules.

These Rules foster new network entry and new broadcast stations. And with new broadcast stations will come the increased competition and diversity in locally-oriented programming that has been the Commission's fundamental goal since the 1934 adoption of the Communications Act.

CONCLUSION

For the above reasons, UPN urges the Commission to retain the Rules and to promote the competition and diversity offered by new networks such as UPN.

Respectfully submitted,

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Dated: November 27, 1995

<u>CERTIFICATE OF SERVICE</u>

I, John G. Holland, hereby certify that the foregoing Reply Comments of the United Paramount Network were served this 27th day of November, 1995, by first class mail, postage prepaid, to the following persons at the addresses listed below:

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